OXFORD JOURNALS
OXFORD UNIVERSITY PRESS

Private Nuisance in the Balance

Author(s): Benjamin J. Pontin

Source: *Journal of Environmental Law*, March 2015, Vol. 27, No. 1 (March 2015), pp. 119-137

Published by: Oxford University Press

Stable URL: https://www.jstor.org/stable/10.2307/26168863

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at https://about.jstor.org/terms

Oxford University Press is collaborating with JSTOR to digitize, preserve and extend access to *Journal of Environmental Law*

JSTOR

This content downloaded from
188.241.177.229 on Sat, 03 Jan 2026 01:16:54 UTC
All use subject to https://about.jstor.org/terms

Journal of Environmental Law, 2015, 27, 119–137
doi: 10.1093/jel/eqv002
Analysis

OXFORD

ANALYSIS

Private Nuisance in the Balance: *Coventry v Lawrence* (*No 1*) and (*No 2*)

Benjamin J. Pontin*

Private nuisance is a tort to land that rests on what moral philosophers sometimes call the 'golden rule' of reciprocity.[1] This is to say, it is about so using your land as not to injure another's, having regard to the essential 'give and take' of neighbourly relations. The central challenge for the courts is to articulate specific legal remedies that give practical application to that ethic. Being a 'good neighbour' will vary from time to time, and from place to place. Furthermore, the law of neighbourly relations in regard to land cannot entirely be divorced from tort's 'other neighbours' (notably those provided for by negligence). Finally, there is the increasingly pressing issue of the relationship between private law and regulatory law relevant to uses of land.

The complexity of the challenge is highlighted by the considerable range of issues addressed by the Supreme Court in the Fen Tigers litigation, reported as *Coventry v Lawrence* (*No 1*)[2] and *Coventry v Lawrence* (*No 2*).[3] No less than five issues of liability relating to 'amenity nuisance' (physical damage was not in point) are given consideration. In addition, attention is given to role of the 'public interest' in relation to the remedy of an injunction. Further addressed are two questions concerning the institutional context of the law—specifically, litigation costs in relation to Article 6

* Bristol Law School, University of the West of England; Benjamin.Pontin@uwe.ac.uk

1 For reciprocity, see in particular Lord Millett's remarks in *Southwark LBC v Mills* [2001] AC 1, 20 ('The governing principle is good neighbourliness, and this involves reciprocity. A landowner must show the same consideration for his neighbour as he would expect his neighbour to show for him'). On relevant philosophical context, see G Keating, 'A Social Contract Conception of the Tort Law of Accident' in G Postema (ed), *Philosophy and the Law of Torts* (CUP 2005) 37. For a lawyer's interpretation of the 'golden rule', see N Duxbury, 'Golden Rule Reasoning, Moral Judgment, and Law' (2009) 84 Notre Dame Law Review 1529. cf more 'instrumental' understandings of nuisance law, eg G Calabresi and D Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral (1972) 85 Harvard L R 1089.

2 [2014] UKSC 13; [2014] All ER D 245 (Feb).

3 [2014] UKSC 46.

© The Author 2015. Published by Oxford University Press.
All rights reserved. For Permissions, please email: journals.permissions@oup.com

This content downloaded from
188.241.177.229 on Sat, 03 Jan 2026 01:16:54 UTC
All use subject to https://about.jstor.org/terms

of the European Convention on Human Rights (the right to a fair trial), and Article 9 of the Aarhus Convention (requiring that access to justice in environmental matters not be prohibitively costly).

The facts of *Coventry* fall squarely within the classic scenario of a persistent injury to the use and enjoyment of neighbouring land, with which the law has been concerned since the origins of legal memory. One defendant occupied a stadium used for speedway and various types of motor car racing (David Coventry), with a second occupying a nearby track used for motorcycle racing (Moto-Land UK Ltd). Also defending the action were the landlords of the first and second defendants, respectively Terence Waters and Anthony Morley. In some reports, Fen Tigers Ltd are mentioned as defendants, but they went into liquidation before the trial and took no part in the proceedings. The claimants, Katherine Lawrence and Raymond Shields, owned a residence (called Fenland) 560 m away from the stadium, and 850 m from the track. They complained of persistent weekend noise from events at the stadium and track (from engines and track-side public announcement systems).

As Lord Goff observed in *Hunter v Canary Wharf Ltd*, the normal—what he called 'primary'—remedy for a persistent nuisance is an injunction.[4] That is an equitable remedy which requires a defendant to modify their behaviour, to make it, in the bluntest terms, right. Usually there will be choices as to how to be a sufficiently good neighbour. Thus the court will typically exercise its discretion to grant an injunction on a suspended basis, to provide a period of time within which parties can arrive at a mutually beneficial mode of compliance in the face of this choice.[5] Such is the centrality of this remedy, that shapes it 'upstream' liability rules, notably who can sue in private nuisance.[6]

Against this backdrop, it is argued that the contribution of *Coventry* to the development of the law is rather mixed. On the one hand, in terms of liability, the rulings can be understood as a robust application of the ethic of reciprocity, sometimes to affirm established rules but also on occasions to challenge conventional wisdom. The more significant adjustments in that latter regard concern prescription, coming to a nuisance, and, most of all, the impact of planning permission. On the other hand, the Supreme Court has arguably lost sight of what nuisance law is when it comes to the critically important question of remedies. It has purported to signal a liberalisation of the law of damages in lieu of an injunction that may limit the availability of the law's primary remedy (an injunction), without any clear justification in principle, and with gaps in the precedents cited.

LIABILITY RULES

Regarding liability, three broad groups of issues can be identified through which to analyse the *Coventry* rulings. These are (following the order in which they are

4 See Lord Goff *Hunter v Canary Wharf Ltd* [1997] 2 AC 655, 692.

5 For examples of mutually beneficial outcomes of injunctions, see B Pontin, *Nuisance Law and Environmental Protection: A Study of Injunctions in Practice* (Lawtext Ltd 2013).

6 *Hunter* (n 4).

This content downloaded from
188.241.177.229 on Sat, 03 Jan 2026 01:16:54 UTC
All use subject to https://about.jstor.org/terms

addressed by the Supreme Court): defences to a nuisance action, specifically prescription and coming to a nuisance; the character of the neighbourhood test, specifically the relevance of planning permission and the role of the defendant's own activity in defining neighbourhood 'character'; and the issue of who can be sued for nuisance in the context of a landlord and tenant relationship.

Defences

Noise and prescription

The defence of prescription has attracted rather little attention in the nuisance law and environment literature. McLaren considered it of minimal assistance to a defendant in a pollution (noise or otherwise) complaint for a number of reasons.[7] One is the difficulty of establishing that the nuisance has the necessary constancy in incidence and effect over the requisite period of 20 years (a difficulty given that levels of most forms of pollution typically fluctuate). Another is that the claimant must have the necessary knowledge of the nuisance over time, so that they can be understood to have acquiesced to it (it is not enough for the defendant to rely on their own knowledge of a 'nuisance' over the relevant period). Finally, there is some doubt as to whether prescription can apply to pollution, including noise.[8]

The Supreme Court has now removed that latter obstacle, in regards to noise, and also taken to some extent a defendant-friendly line on obstacle one (constancy of pollution). Approving the opinion of Lewison LJ in the Court of Appeal, Lord Neuberger agreed that a prescriptive right could lie in the form of a 'right to emit sound waves' over another's land.[9] That right takes the form of an easement. And in terms of constancy, a break in a defendant's activity of two years (as on the facts in *Coventry*) need not defeat this defence.[10]

This will require some rewriting of many nuisance texts regarding noise, but the defence ultimately failed. It did so for want of acquiescence:

> it is not enough to show that the activity which now creates the noise has been carried on for 20 years. It is not even enough to show that the activity has created a noise for 20 years. What has to be established is that the activity has (or a combination of activities have) created a nuisance over 20 years. Otherwise, it could not be said that the putative servient owner had the opportunity to object to the nuisance, or could be said notionally to have agreed to it.[11]

At risk of a simplistic philosophical engagement with this aspect of the ruling, it does appear that acquiescence fits well with the principle of reciprocity (it is about give and take or, if this is indeed a sensible distinction, 'take and give').

7 JPS McLaren, 'The Common Law Nuisance Actions and the Battle for the Environment: Well-Tempered Swords or Broken Reeds?' (1972) 10 Osgoode Hall LJ 505, 543.
8 *Clerk and Lindsell on Torts*, 20th edition (Sweet and Maxwell 2010) [20–85].
9 Lord Neuberger [33], with reference *Coventry v Lawrence* [2012] WLR 2127 [88].
10 ibid [140]–[141].
11 ibid [143].

This content downloaded from
188.241.177.229 on Sat, 03 Jan 2026 01:16:54 UTC
All use subject to https://about.jstor.org/terms

Coming to a nuisance

Blackstone was among the first nuisance commentators to moot the defence now known as 'coming to the nuisance':

> If my neighbour makes a tanyard, so as to annoy and render less salubrious the air of my house and gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and may continue.[12]

In the 19th century, from which much of the modern law dates, Lord Halsbury dismissed this passage as expressing an 'old notion [that had been] long since exploded';[13] he stated categorically that 'whether the man went to the nuisance or nuisance came to the man, the rights are the same'.[14]

However, it is not clear why that should be so in terms of reciprocity, and that is why Lord Denning departed from Lord Halsbury's approach in his dissenting judgment in *Miller v Jackson*.[15] In that case, Mr and Mrs Miller are depicted by Denning as excessive 'takers' within the neighbourhood into which they moved (giving nothing in return). It was 'thoughtless and selfish' for the developers, Wimpey Homes, [16] to build right up to the edge of the 70-year old cricket club to exploit the pleasing view, and the same moral failing applied to the Millers, who demanded that the club change its ways to accommodate their new neighbours and the new residential use of the neighbouring land (previously farmland).

By analogy with *Miller*, the court in *Coventry* drew a distinction between a claimant new to an area 'continuing with the use of the property which had been started before the defendant's nuisance-causing activities' on the one hand (the *Coventry* scenario)[17] and 'a claimant who builds on, or changes the use of, her property, after the defendant has started the activity alleged to have caused a nuisance' on the other (the *Miller* scenario).[18] On the former scenario there could be no question of the defence of coming to a nuisance being satisfied, but on the latter scenario there could (all things being equal). This is a welcome distinction, and it potentially requires a new perspective on *R v Exeter CC ex parte Thomas*.[19]

Character of the Neighbourhood

There is nothing particularly modern about the notion of the existence of a nuisance being determined with reference to the prevailing neighbourhood vernacular.

12 W Blackstone, *Commentaries on the Laws of England, vol II* (Clarendon Press 1765–1769) 402–03. A portion of this is quoted in *Coventry* [50].

13 *London, Brighton and South Coast Railway v Truman* (1885) LR 11 App Cas 45, 52.

14 *Fleming v Hislop* (1886) LR 11 App Cas 686, 697 (cited at [47]).

15 *Miller v Jackson* [1977] QB 966, 978.

16 ibid.

17 *Coventry* [52]. Though the claimants in *Coventry* moved into Fenland over 30 years after motor racing had been practiced on the defendants' land, their land had long been used for residential purposes.

18 ibid [53].

19 [1991] 1 QB 471 (an applicant for judicial review complained that the respondent local planning authority had unlawfully exposed them and other occupiers of an industrial quarter to a nuisance injunction, by granting permission for a nearby potentially conflicting residential change of use).

This content downloaded from
188.241.177.229 on Sat, 03 Jan 2026 01:16:54 UTC
All use subject to https://about.jstor.org/terms

This dates back at least as far as *Jones v Powell*.[20] Nonetheless, Lord Westbury made no mention of this authority when, in *Tipping v St Helen's Smelting*,[21] he stated that 'If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on the immediate locality'.[22] Nor did Thesiger LJ look beyond *Tipping*, back to *Jones*, in commenting that 'what may be a nuisance in Belgrave Square would not necessarily be so in Bermondsey'.[23]

Critics point out that it is unfair that so called 'amenity nuisance' is post-code sensitive.[24] But that did not trouble counsel in *Coventry*, who worked within the Jones/Westbury/Thesiger paradigm, focusing rather on two issues of detail concerning the assessment of the character of the neighbourhood: first, the relevance of the defendant's land use; second, the relevance of land use regulation.

The defendant's land use

The first 'sub-issue' concerned the part played by the defendant's usage of land in the characterization of the neighbourhood within which the actionability of the nuisance is to be assessed. By way of background, the Court of Appeal had ruled that the defendants' noisy usages of the land were as much part of the pattern of land uses as anything else and must be taken into account as characteristics of the neighbourhood: 'Throughout the period when the claimants were living at Fenland the noise generated from time to time by motor sports was "one of the noise characteristics of the locality."'[25]

Lord Neuberger, again delivering judgment for the court, departed from the Court of Appeal. He introduced a simple (in effect) two stage test for resolving this issue. First take the neighbourhood as one finds it, with nothing—including the defendant's noise (or smell etc)—filtered out. Then one 'notionally strips out' the 'nuisance itself'.[26]

The circularity in this approach is acknowledged by Lord Neuberger as a 'cause for concern'. That is to say, when the point of the exercise is to decide whether a nuisance exists, it difficult to first strip out nuisance without begging the central

20 (1629) HLS MS 1083 folio 50v, 603. Jones J reasoned that nuisance remedies an 'obnoxious' activity in an 'inapt place'. He gave examples of a proprietor in Ludgate Hill, Newgate and Cheapside (the sites of London's dirty business) the sites of London's dirty business as subjecting themselves to/acquiescing in conditions of foul air and the like to a degree that could not be said of residents of more salubrious neighbourhoods. Note case concerned physical or material injury (scorching of paperwork by a brewery's emissions).

21 (1865) HL Case 642.

22 ibid 650. See further Lord Westbury's juxtaposition of town and country in *Clarke v Clarke* (1865) LR 1 Ch App 16 at 188 ('Persons who live in towns, and more especially in large cities, cannot be expected to enjoy continually the same unobstructed volumes of light and air as fall to the lot of those who live in the country').

23 *Sturges v Bridgman* (1879) 11 Ch 852, 865.

24 '[T]hose who suffer most from the ravages of pollution are the least worthy of protection' (McLaren, (n 8)).

25 *Coventry* (CA), (n 9), [72] (Jackson LJ).

26 *Coventry* (*No 1*) (n 2), [65].

This content downloaded from
188.241.177.229 on Sat, 03 Jan 2026 01:16:54 UTC
All use subject to https://about.jstor.org/terms

question. However, it is considered justified, on policy grounds, as the lesser of evils:[27]

> If the activity which causes the alleged nuisance is taken into account, without modification, as part of the character of the locality, it would mean that there could rarely be a successful claim for nuisance, as I see it'.[28]

This recourse to policy reasoning is quite fitting in this particular setting, because the locality test is not about logic and high principle but about policy. The function of the law is to conserve prevailing amenity standards where possible, rather than aspire to its progressive improvement and/or levelling of distribution.[29]

Planning consent

In the same year that *Tipping* was decided, the world's first national pollution control inspectorate was created, under the Alkali Act 1863 (it was called Her Majesty's Alkali Inspectorate). Historical evidence suggests that nuisance victims believed that compliance with the Alkali Inspectorate's regulatory remit—initially in respect of air but subsequently extending to water and land also—immunized the defendant from common law liability, providing a defence to a nuisance action. However, the Alkali Inspectorate did not see it that way, nor, crucially, did the courts. The Diceyan principle of legality (AV Dicey's third meaning of the 'rule of law') precluded common law rights being limited except through the legislature's use of the clearest language.[30] That is to say, administrative bodies are constitutionally subject to, rather than supreme over, common law rights.

The principle of legality has broadly similar force today, albeit that the modern legislature pursues collective/welfare policies that rely on broad executive discretion, in relation to which nuisance law can sometimes appear inconveniently pastoral and parochial. Indeed, in the field of the environment, the desirability of replacing common law protection of riparian rights with more instrumentally rational public regulatory schemes (policed by a combination of technocrats and locally elected members) was mooted in the Hobday Report,[31] and subsequently taken up

27 ibid [66].

28 ibid [73].

29 Amenity may not have been actionable in *any* circumstances prior to Lord Westbury's intervention, such that the character of the neighbourhood test can be understood as a concession that preserved the de facto zoning of insalubrious industrial quarters in which polluters were largely free to pollute: B Pontin, 'Nuisance Law and the Industrial Revolution: A Reinterpretation of Doctrine and Institutional Competence' (2012) 75 MLR 1010, 1021–22. See more generally J Penner, 'Nuisance, the Morality of Neighbourliness, and Environmental Protection' in J Lowry and R Edmunds (eds), *Environmental Protection and the Common Law* (Hart 2000) 28, 40 (nuisance law is 'conservative').

30 For quite recent sympathetic judicial treatment of Dicey's principle of legality, see eg Lord Steyn in *R v Secretary of State for the Home Department ex parte Pierson* [1998] AC 539, 587–91; and Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms and O'Brien* [2000] 2 AC 115, 132 (in limiting common law rights Parliament 'must squarely confront what it is doing and accept the political cost').

31 SR Hobday, *Report of the Central Advisory Water Committee, Rivers Pollution Prevention Sub-Committee* (HMSO 1949).

This content downloaded from
188.241.177.229 on Sat, 03 Jan 2026 01:16:54 UTC
All use subject to https://about.jstor.org/terms

by the government in sponsoring the Rivers Pollution Bill of 1950.[32] On the basis of this and developments in the field of town and country planning, Glanville Williams painted a 'general picture . . . of administrative action supplementing or even supplanting the spasmodic application of the law of tort'.[33]

However, with one or two notable exceptions, Parliament has not sought to explicitly limit rights protected by private nuisance in the course of enacting public interest planning and environmental legislation. Rather, to the modest extent that nuisance law has been conceived of as limited by regulation, some of the initiative has come from the courts.[34] In *Allen v Gulf Oil Refining*,[35] Cumming-Bruce LJ pondered the possibility that the Town and Country Planning Act 1947 impliedly conferred on a local or national planning authority the 'power to permit the change of the character of a neighbourhood in relation to the comfort and convenience of the inhabitants'.[36] This was approved and applied by Mr Justice Buckley in *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd*[37]—the ruling that is above all at the heart of *Coventry*.

At first instance in *Coventry*, *Gillingham* was distinguished, as applying to a development of extraordinary size and strategic importance. That could not be said of the defendants' motor racing activities:

> Unless one is prepared to accept that *any* planning decision authorises any nuisance which must inevitably come from it, the argument that the nuisance was authorised by planning permission in this case must fail.[38]

The defendants successfully appealed. The Court of Appeal held that the defendants had the benefit of a planning consent in relation to an area sufficiently 'large' as to engage *Gillingham*.[39]

Commentary in the leading law journals was cautiously welcoming, or at least accepting, of *Gillingham*, as an example of the nuisance law's responsiveness to modern regulation.[40] *Gillingham* was also sympathetically received by many judges. Lords Hoffmann and Cooke thought it a good rule when they reflected on it

32 Rivers Pollution Prevention Bill 1950 (HMSO 1950). See further B Pontin, 'Defending Fundamental Riparian Rights from Proposed Regulatory Law Limitations: Lessons from Parliamentary History' (2006) 17(1) J Water Law 3.

33 G Williams 'The Aims of the Law of Torts' (1951) 4 Current Legal Problems 137, 176.

34 *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42, 58 (a cause of action in nuisance law does not lie where that would be 'inconsistent' with a statutory scheme which 'left no room' in that case for a common law remedy). See further M Lee, 'Occupying the Field: Tort and the Pre-emptive Statute' in T Arvind and J Steele (eds), *Tort Law and the Legislature* (Hart 2013).

35 [1980] 3 WLR 529.

36 ibid 174.

37 [1993] QB 343, 359 ('a planning authority can, through its development plans and decisions, alter the character of a neighbourhood. That may have the effect of rendering innocent activities which prior to the change would have been an actionable nuisance'.

38 *Lawrence v Fen Tigers Ltd* [2011] EWHC 360 (QB), [62] [emphasis added].

39 (n 9).

40 See T Jewell and J Steele, 'Nuisance and Planning' (1993) 56 MLR 568, For a more forthright endorsement of the idea of property rights being limited by 'democratic' regulation, see P Bishop and V Jenkins, 'Planning and Nuisance: Revisiting the Balance of Public and Private Interests in Land-Use Development' (2011) 23 JEL 285. For a little more caution, see Penner (n 29) 38.

This content downloaded from
188.241.177.229 on Sat, 03 Jan 2026 01:16:54 UTC
All use subject to https://about.jstor.org/terms

in *Hunter v Canary Wharf*.[41] And though it was distinguished in *Wheeler v Saunders*[42] and *Watson v Croft Promo-Sport Ltd*,[43] there appeared no appetite for treating the rule as an untenable anomaly. The greatest judicial reservations were those of Sir Peter Gibson, who in *Wheeler* urged that the courts 'should be slow to acquiesce in the extinction of private rights without compensation as a result of administrative decisions which cannot be appealed'.[44] He did not, however, seek to doubt the validity of *Gillingham* as a narrowly drawn exception.

Yet in what is among the most significant outcomes of the Supreme Court decision in *Coventry*, *Gillingham* has been overruled. Lord Neuberger stated that *Gillingham* was 'wrong in principle'.[45] The court was particularly concerned with Buckley J's counterintuitive idea that the bigger the consented development (*Gillingham* concerned permission for a commercial dock)—the weaker the case for a nuisance arising from it being remedied:

> It would . . . be somewhat paradoxical if the greater the likely disagreeable impact of a change of use permitted by the planning authorities, the harder it would be for the claimant to establish a claim in nuisance.[46]

Lord Neuberger also based his argument on constitutional principle. He considered that Buckley J had lost sight of the autonomy of private law and administrative regulation. The effect of planning consent is to remove 'only' a *public law* obstacle to the development of land.'[47] It does not and cannot remove private law obstacles; only Parliament can do that.

By contrast, Lord Carnwath can be understood as partially dissenting. He preferred to distinguish *Gillingham,* as the Court of Appeal had in *Wheeler* and *Watson*:

> I would accept . . . that in exceptional circumstances a planning permission may be the result of a considered policy decision by a competent authority leading to a fundamental change in the pattern of land uses, which cannot sensibly ignored in assessing the character of the area against which the acceptability of the defendant's activity is to be judged.[48]

Examples of the circumstances in which Buckley J's rule could be validly applied offered by Lord Carnwath are *Gillingham* itself, and *Hunter v Canary Wharf*.[49]

41 See (n 4) above.
42 *Wheeler v Saunders* [1994] EWCA Civ 32.
43 [2009] EWCA Civ 15.
44 35G. See also Sir John May in *Wheeler* (n 42).
45 *Coventry* (*No 1*) (n 2), [90].
46 ibid [88].
47 ibid [89] ('The grant of planning permission for a particular development does not mean that that development is lawful. All that it means is that a bar to its use imposed by planning law, in the public interest, has been removed').
48 ibid [223].
49 (n 4). cf M Lee, 'Hunter v Canary Wharf' in C Mitchell and P Mitchell (eds), *Landmark Cases in Tort Law* (Hart Publishing 2010) (attaching significance to the 'fast-track' character of planning permission in this case, in contrast to the public inquiry process underlying *Gillingham*).

This content downloaded from
188.241.177.229 on Sat, 03 Jan 2026 01:16:54 UTC
All use subject to https://about.jstor.org/terms

(He agreed *Coventry* was not one of them, and thus the resolution of the appeal here was unanimous.)

Planning and environmental lawyers will find it significant that Lord Carnwath's overriding concern in this aspect of the judgment was to avoid nuisance and planning 'pull[ing] in the opposite direction'.[50] The direction (or role) of planning control (according to Lord Carnwath) is to provide a framework for 'generally represent[ing] society's view of the appropriate balance of uses in a particular area'.[51] The role of nuisance is:

> to provide a residual control to ensure that new or intensified activities do not lead to conditions which . . . go beyond what a normal person should be expected to put up with.

The use of the term 'residual' here is thought provoking. It may be interpreted by some to mean minor, or peripheral, but not necessarily so. To put this in perspective, constitutional lawyers refer to the *residual* jurisdiction of the High Court to supervise the executive. On that basis, judicial review is residual *and* fundamental, and nuisance law could be understood as similar in that respect.

Nonetheless, Lord Carnwath sought to step back a little from a recent judgment of his—indeed that in *Barr v Biffa Waste Services Ltd,* on which the majority in *Coventry* relied in overruling *Gillingham*.[52] The passage in *Barr* is as follows:

> There is no principle that the common law should 'march with' a statutory scheme covering a similar subject matter. Short of express or implied statutory authority to commit a nuisance . . . there is no basis, in principle or authority, for using such a statutory scheme to cut down private rights.[53]

Lord Carnwath explained that his 'does not march' thesis is historically accurate, but it is 'unduly simplistic' when applied to modern planning and environmental regulation. He advocates a more flexible principle, looking at each case in its detailed regulatory context.[54] The majority approved the more simplistic approach.

Landlord Liability

Landlords are not, nor have they ever been, vicariously liable for the wrongs of their tenants. This is in contrast to the law of negligence in regard the different context of employer and employee relations. The contrast here is curious, at least to the extent that the policy justifications for vicarious liability—ease of insurance and deterrence of harm using a position of influence[55]—appear to stand up to scrutiny equally well in

50 *Coventry* (*No 1*) (n 2), [194].
51 ibid [183].
52 Eg Lord Neuberger, ibid [92].
53 *Barr and Biffa Waste Services Ltd* [2013] QB 455, [46(ii)], cited with approval by Lord Neuberger in *Coventry* (*No 1*) ibid, [92].
54 ibid [198]. He cites Maria Lee's commentary on his judgment in *Biffa* (M Lee, 'Nuisance and Regulation in the Court of Appeal' [2013] JPL 277, 284) as persuading him to adopt a more flexible, case by case approach.
55 M Lunney and K Oliphant, *Tort Law: Texts and Materials* (5th edn, OUP 2013) 803.

This content downloaded from
188.241.177.229 on Sat, 03 Jan 2026 01:16:54 UTC
All use subject to https://about.jstor.org/terms

each field. Be that as it may, the law is fairly settled that a landlord's liability in nuisance arising from a tenancy is based on two pathways: one, their authorising the nuisance; two, their directly participating in the nuisance-causing activity.

Coventry (*No 2*) makes a subtle adjustment to—or perhaps what is better described as a clarification of—the law concerning authorisation. This is a reference to the case (on similar facts) of *Tetley v Chitty*,[56] regarding noise from go-karts. In that case, the local authority landlord was held to have authorised the nuisance by the grant of a lease from which there was a 'likelihood' or 'foreseeability' of nuisance. This appeared to assist the claimants in *Coventry*, but Lord Neuberger (delivering judgment for the majority) did not mention it, whilst Lord Carnwath (who did) considered the case wrongly decided insofar the proper test is more exacting; it is whether the nuisance was a 'necessary' or 'highly probable' consequence of the tenancy. That test was not satisfied in *Coventry*—it was possible for motor racing events of the tenants to be carried on without nuisance.[57]

For purposes of participation, the court was divided. Whilst it was agreed that collecting rent and having the power as landlord to intervene to abate the nuisance did not amount to participation (as per *Southwark London Borough Council v Mills*),[58] opinion differed on the significance to be attached to other possible indicia of participation. Lord Neuberger (with whom Lords Clarke and Sumption agreed) distinguished between facets of landlord participation *prior* to the tenancy (generally not relevant), and those *subsequent* to it (most relevant). Thus Lord Neuberger did not consider it of any more than marginal relevance that Mr Waters had earlier, as owner and occupier, been using the stadium for motor racing.[59]

Lord Carnwath (with Lord Mance) considered Lord Neuberger's distinction between pre- and post-lease activity to be open to criticism, as both overly technical and unnecessarily narrow. Their preference was for a 'common sense view', looking at all the circumstances in the round.[60] Applied to the facts, this dissenting argument continued, the landlords each had a 'central role'[61] in the noisy enterprises and were thereby liable as direct and active participants. Lord Mance attached added significance to the failure of the landlords to differentiate themselves from the tenants at trial. This, to reiterate, is the dissenting opinion.

INJUNCTIONS AND DISCRETION

As explained at the outset, the award of an injunction (as it is sometimes put) 'virtually as of right' is quite integral to modern nuisance law.[62] It is the main reason why most proprietors sue in cases of nuisance of a persistent nature, and this in turn is one of the main reasons why standing to sue is confined to the proprietor.

56 [1986] 1 All ER 663.
57 *Coventry* (*No 2*) (n 3), [95].
58 [2001] 1 AC 1.
59 *Coventry* (*No 2*) (n 3), [20].
60 ibid [59].
61 ibid [63].
62 RA Buckley, 'Injunctions and the Public Interest' (1981) 44 MLR 212, 214.

This content downloaded from
188.241.177.229 on Sat, 03 Jan 2026 01:16:54 UTC
All use subject to https://about.jstor.org/terms

The qualification '*virtually* as of right' is apt, because an injunction is an equitable remedy. Thus we cannot speak strictly of rights; a beneficiary enjoys an injunction at the discretion of the court. Looking closely at the scope of the discretion, there are in effect three aspects, or layers, that have occupied the courts:

1. Whether to grant an injunction (as opposed to, that is, some other remedy, or no remedy at all).
2. Whether to grant damages 'in *addition* to, or in *substitution* of' an injunction (provided for under section 50, Senior Courts Act 1981).[63]
3. If an injunction is to be awarded under either or 1 or 2 above, on what terms it is to be awarded (including whether the injunction should be suspended with or without equitable damages while the suspension remained in force).

Although there has been rather limited academic discussion of the exercise of this discretion in relation to 1 and 3 in particular—the literature has mainly concerned 2—the case law is fairly clear. Without embarking on a general analysis, sticking rather to the key issue in *Coventry* of the relevance of the public interest, it can be understood that one of the leading modern cases is *Pride of Derby v British Celanese Ltd*.[64]

In *Pride of Derby*, British Celanese Ltd, Derby Corporation and the British Electricity Authority were liable for nuisance consisting of rivers pollution (the claimants were riparian proprietors). The first defendant was a large private chemical company, the second and third defendants being a local authority and a nationalised electricity generating and supply industry respectively. They argued that it was not in the public interest for them to be injuncted (because that would damage vital private and public services). Lord Denning explained that this was not a reason to refuse an injunction:[65]

> [public interest arguments] are strong reasons for suspending the injunction, but are no reason for not granting it.

Romer LJ alluded to the 'innumerable occasions' on which the courts had ruled that the proper way to accommodate the public interest is at the level of the terms of an injunction.[66]

The Supreme Court did not consider this authority. Possibly that was because it was not thought relevant to the question the court addressed, which was not on what terms to grant an injunction (issue three above), but in what circumstances to substitute damages in lieu (part of issue 2 above). More specifically, the Supreme Court focused on the validity of the ostensible exclusion of the public interest from the 'good working rule' of Smith LJ in *Shelfer v City of London Electric Lighting Company*.[67] However, it is arguably difficult satisfactorily to ignore the rules relating

63 Emphasis added. This power first appeared in s 2 Chancery Court Amendment Act 1858 ('Lord Cairns' Act').

64 *Pride of Derby v British Celanese Ltd* [1953] Ch 149.

65 ibid 192.

66 ibid 194.

67 *Shelfer v City of London Electric Lighting Company* [1895] 1 Ch 287, 322–23.

This content downloaded from
188.241.177.229 on Sat, 03 Jan 2026 01:16:54 UTC
All use subject to https://about.jstor.org/terms

to wider issues of discretion. Flexibility in the terms on which an injunction is granted is a cross-cutting issue of pervasive relevance.

In order to appreciate the possible significance of the fuller picture, in relation to 'layer 3' in particular, it is helpful to go back to the judgments of one of the very first Chancery judges to advocate the suspended injunction as the appropriate means of accommodating public interest considerations: Vice Chancellor William Page Wood (later Lord Hatherley, Lord Chancellor between 1868 and 1872). In *Attorney-General v Birmingham Corporation*,[68] he awarded an injunction in favour of the aristocrat, Charles Bowyer Adderley, restraining the Corporation from using its expensive new sewage infrastructure so as to cause a nuisance (arising from raw sewage being discharged into the River Tame that ran through Adderley's estate). The injunction was granted notwithstanding that the wrongdoer had urged the court to spare the public the loss of a vital sanitary service. However, as a discretionary concession, it was suspended for a period of 37 years, throughout which Adderley received equitable damages in lieu of the suspension.

Here are some salient passages from the *Birmingham* case, beginning with the defendant's argument as to why an injunction should not be granted:

> [Are] the lives of 250,000 of her majesty's subjects in Birmingham to be imperilled for the convenience of an individual?'
> The evil that must ensue if the court should [find for the claimant] would be incalculable . . . .Birmingham will be converted into one vast cesspool . . . the deluge of filth will cause a plague, which will not be confined to the inhabitants of Birmingham, but will spread over the entire valley to become a national calamity.

Page Wood explained why this was no reason to decline the injunction:

> Now . . . it appears to me that, so far as this Court is concerned, it is a matter of almost absolute indifference whether the decision will affect a population of 25,000 [*sic*], or a single individual carrying on a manufactory for his own benefit . . . I am not sitting here as a committee for public safety, armed with arbitrary power to prevent, what it is said, will be a great injury not to Birmingham only, but to the whole of England; that is not my function.[69]

However, it *was* a good reason to award the injunction on terms that were suspended:

> Before granting an injunction compelling *the sudden stoppage of works* like these, inasmuch as such an injunction might produce considerable injury, the Court, by way of an indulgence, would afford the Defendants *every* conceiveable facility to enable them to remedy the evil complained of.[70]

68 (1858) 4 K and J 528.
69 ibid 539.
70 ibid 541 [emphasis added]. This was later echoed by Lindley LJ in *Shelfer* (n 67) 315–16.

This content downloaded from
188.241.177.229 on Sat, 03 Jan 2026 01:16:54 UTC
All use subject to https://about.jstor.org/terms

There are two rationales for this approach. One is to spare the public of the terrible inconvenience of having an errant utility provider closed down. Equity could not possibly countenance the public suffering in this way (the argument goes), and thus it is fair for the claimant to be subjected to a continuing nuisance, on a temporary basis, and to be satisfied with equitable damages in the interim. On the other hand, it is to channel to a good cause the wrong-doers' powers of invention leading to the discovery of ways of being a better neighbour. 'How the town is to be drained is up to the Corporation to discover'.[71] Discovery requires experimentation, which in turn requires a living laboratory in which to test and prove possible technological fixes. A suspension affords that, even if in complex cases it may need to be eye wateringly long (as in *Birmingham*).

Page Wood's paradigm in *Birmingham* was adhered to by subsequent Vice Chancellors during the lengthy post-injunction proceedings,[72] but more significant (as a precedent) is the House of Lord's upholding of the same approach, by the same judge, on similar facts, in the gas works nuisance case of *Broadbent*.[73] In that case Page Wood (as far back as 1856) had granted an injunction on a suspended basis against the appellant statutory gas undertaking, restraining emissions of acid gas that scorched the claimant's vegetation. Lord Campbell (the Lord Chancellor) agreed that the courts should not refuse an injunction on grounds of public interest, and that the better option is to grant an injunction on a suspended basis, to facilitate an orderly and convenient mode of compliance with the common law. If no means of abating nuisance is known to industry, the wrongdoer may 'invent one'.[74] Equity would allow time to invent and adopt any invention into practice.

Injunctions in light of *Coventry* (*No 1*)

To reiterate, the Supreme Court focussed on accommodating the public interest with reference to a revision of the *Shelfer* guidelines (ie a focus on 'layer' 2, above), thus omitting any consideration of the alternative (indeed established) practice above. It did so against the backdrop of a *suspicion* that the trial judge was possibly unaware of the nature of his discretion, although that is arguable. Certainly, on its face, the injunction awarded by Seymour J appears exemplary of the nuanced, discretionary practice described above. One thing to note is the flexible way in which it provided for a weekend norm for emissions of noise that could be exceeded up to 12 weekends a year. Another facet of flexibility is the way in which the injunction was suspended, in the first instance, for almost two years (the suspension expired during the course of the appeal).

The Supreme Court Justices differed as to how far it was appropriate to move away from the *Shelfer* rules to make it easier for a court minded to grant an injunction to grant damages instead (no consideration was given to the possibility of damages *in addition*). Lord Sumption was most far reaching in his concern with

71 ibid.

72 See Pontin (n 5), and most recently L Rosenthal, *The Rivers Pollution Dilemma in Victorian England* (Ashgate 2014), 79–85 (in relation to the orders of Vice Chancellor Bacon).

73 *Imperial Gas Light and Coke Co v Broadbent* (1859) 7 HL Cas 600.

74 ibid 611.

This content downloaded from
188.241.177.229 on Sat, 03 Jan 2026 01:16:54 UTC
All use subject to https://about.jstor.org/terms

the lack of accommodation of the public interest generally, and the economy in particular, in *Shelfer*.[75] He proposed something of a presumption against an injunction being awarded in any action where there is significant third-party interest (which applies to most nuisance actions). Essentially this is a presumption in favour of damages in substitution of an injunction. On that radical basis, the whole structure of nuisance would require rethinking, beginning with who can sue in nuisance.

By contrast, and perhaps representing the most moderate line, Lord Mance emphasised the potential inadequacy of compensation as a remedy for interference with the 'right to enjoy one's home'.[76] Of course, there is the difficulty, post-*Hunter*, of referring to nuisance law as protecting one's 'home' (strictly speaking it protects one's property in land). Nonetheless, the point is well made that nuisance claimants who occupy land for residential purposes are often seeking to protect an interest in something relatively permanent and central to their life—something that is imbued with moral significance.

Lord Carnwath advocated a 'flexible approach', which allows for damages instead of an injunction to be awarded more liberally, on a case-by-case basis. Flexibility does not appear to involve any presumption (eg in respect to planning permission being a reason for granting damages instead of an injunction), although according to his never say never approach, planning permission could, in some circumstances, justify refusal of an injunction.[77] Lord Carnwath drew a very important distinction between the classic nuisance scenario mentioned at the outset of this analysis, which can be remedied by a reorganisation of the tortfeasor's enterprise; and the more exceptional scenario—such as in right to light cases—where the options for compliance are of an all-or-nothing character (lending themselves a little more to equitable damages). This appears to respect the centrality of the injunction in classic cases.

Lord Neuberger, in a speech around which the court united in *Coventry* (*No 2*), addressed the issue at greatest length (35 paragraphs). He expressed sympathy with Lord Sumption, but contemplated that injunctions would generally remain the normal remedy, subject to some important exceptions. One possible exception was where the wrong-doer was an important part of the local economy:

> The fact that a defendant's business may have to shut down if an injunction is granted should, it seems to me, obviously be a relevant fact, and it is hard to see why relevance should not extend to the fact that a number of the defendant's employees would lose their livelihood . . . [78]

However, perhaps mindful of the fact that many wrongdoers in the field of nuisance are businesses, Lord Neuberger held back from presenting trial judges with a yardstick that could lead to Lord Sumption's reverse presumption; he cautioned that 'in many cases [loss of livelihoods] may well not be sufficient to justify refusal of an injunction'.[79]

75 *Coventry* (*No 1*) (n 2), [160]–[162].
76 ibid [163].
77 Foreshadowed in his judgment to that effect in *Barr* (n 53), [124],
78 *Coventry* (*No 1*) (n 2), [124].
79 ibid.

This content downloaded from
188.241.177.229 on Sat, 03 Jan 2026 01:16:54 UTC
All use subject to https://about.jstor.org/terms

Another circumstance in which an injunction may appropriately be declined on Lord Neuberger's analysis is where the tortious activity has the benefit of planning permission, and here Lord Neuberger's qualification to the 'as of right' approach is far reaching:

> In some cases, the grant of planning permission for a particular activity (whether carried on at the claimant's, or the defendant's, premises) may provide strong support for the contention that the activity is of benefit to the public, which would be relevant to the question of *whether or not to grant* an injunction.[80]

Neuberger added that particular weight would be attached to a permitted activity that 'cannot be carried out without causing the nuisance complained of', where the planning permission could have 'real force' as a reason to refuse an injunction.[81] This is where the omission of the Page Wood paradigm is perhaps most significant, for the whole thrust of a suspension is to challenge the rather monolithic idea of a nuisance that is 'inevitable'.

'Inconclusive' is one word that sums up these judgments—a point of which the Court is well aware ('there are differences between the various members of the Court on this . . . issue').[82] Another, which is more serious, is *incomplete*. 'How should damages be calculated?' is one question left open. However, the more searching and fundamental questions are 'why the need for change?' given the broader picture the court has overlooked, and, most pressing, 'what may be the consequences, intended or otherwise, of change?'

Injunctions in light of *Coventry* (*No 2*)

The Supreme Court subsequently united around Lord Neuberger's approach without any further discussion, in the context of what in *Coventry* (*No 2*) is surprisingly rebranded a 'minor issue'.[83] It ruled that the respondents (if they wished) could apply to the trial judge to have the injunction discharged and damages awarded instead. The trial judge, it further ruled, would be guided by Lord Neuberger's opinion first time around. This amounted to a change in the law (in *Coventry* (*No 1*) Neuberger stated 'we are changing the practice of the courts').[84]

The respondents will certainly believe that they have a good chance of being awarded damages instead of an injunction, but there is much uncertainty concerning what kind of sum of equitable damages would be appropriate. Depending on the sums involved, it may or may not be more attractive to the respondents after all to correct their ways in line with the injunction whose suspension has expired, asking for a renewed suspension to reorganise affairs.

Another uncertainty concerns the effect of those established and authoritative practices which the Supreme Court has not explicitly purported to change—notably

80 ibid.
81 ibid.
82 ibid [132].
83 *Coventry* (*No 2*) (n 3), [5].
84 *Coventry* (*No 1*), (n 2).

This content downloaded from
188.241.177.229 on Sat, 03 Jan 2026 01:16:54 UTC
All use subject to https://about.jstor.org/terms

that stemming from the rulings of Page Wood VC in the mid-19th century which have the highest appellate support. It is arguable that Seymour J remains bound by the rule that public interest considerations are best (if no longer 'only') accommodated by the 'device' of the suspended injunction. If so, he could stand by his original ruling. How to do so without turning a drama concerning *stare decisis* into a crisis is another matter. Law Commission inquiries, practice directions and even statutory intervention are all longer-term options for restoring confidence in the law, should the issue not be resolved soon.

THE 'INSTITUTIONAL ISSUE' OF COSTS

Costs are of critical practical importance to nuisance law, and have been for at least two centuries. Nuisance proceedings in medieval and early modern times were often summarily dealt with in local courts, in an ostensibly inexpensive fashion. Things changed in Victorian times, when nuisances increased in scale (with industrialisation), when scientific witnesses on both sides were called on to provide expert testimony on pollution pathways and effects, and when injunctions became the remedy of choice for nuisance victims. Nuisance law in these circumstances ceased to be within the reach of victims of ordinary means.[85] *Coventry* highlights the flipside—the possibly prohibitive costs of *defending* an action.

In *Coventry*, the defendants were liable for 60% of the claimants' costs (as per the unchallenged decision of the trial judge). The problem was the large sum into which that translated. Specifically, the total base costs were £398,000. On top of this was the success fee of £319,000 and, additionally, the after the event insurance premium (ATE) of £350,000. Thus the respondents were liable for £640,000 in adverse cost or, in Neuberger's words a 'very disturbing' sum of money.[86]

One of the respondents' arguments was that the cost order concerning the success fee and ATE premium lacked proportionality and thereby violated the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR) (as given effect by the Human Rights Act 1998). Another concerned the obligation on the UK in the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to ensure that access to justice in environmental matters is not prohibitively costly (Article 9).

Article 6, European Convention on Human Rights

A main reason for the high-adverse costs above is that the parties *Coventry* were operating under the discredited, and repealed, conditional fee arrangement (CFA) regime provided by section 27 Access to Justice Act 1999. Lord Neuberger summarised the four main criticisms of this statutory arrangement as follows:

> First, claimants had no interest whatever in the level of base costs, success fee or ATE premium which they agreed with their lawyers as, if they lost, they had to pay nothing, and if they won the costs would all be paid by the defendant . . .

85 As argued by John McLaren, costs became an 'institutional impediment' in the way of nuisance law remedying meritorious claims ('Nuisance Law and the Industrial Revolution: Some Lessons from Social History' (1983) 3 OJLS 155, 195).

86 *Coventry* (*No 2*) (n 3), [33].

This content downloaded from
188.241.177.229 on Sat, 03 Jan 2026 01:16:54 UTC
All use subject to https://about.jstor.org/terms

> Secondly, in many cases, unsuccessful defendants found themselves paying, in addition to the whole of their own costs, three times the claimants' 'real' costs. Thirdly . . . .proportionality . . . was excluded from consideration in relation to the recovery of the success fee or ATE premium (which were simply required to be reasonable) . . .
> Fourthly, the stronger the defendants' case, the greater their liability for costs would be if they lost, as the size of the success fee and ATE premium should have reflected the claimants' prospects of success.[87]

The respondents argued that £669,000 in success fee and ATE premium (inclusive) was not proportionate, even if it was more narrowly (as required by the statutory regime) reasonable.

Consideration of the merits of the human rights argument was adjourned pending representations from the Government. Without entering into a detailed discussion of the idiosyncratic approach to giving domestic effect to the ECHR under the Human Rights Act, it must be noted that any declaration of incompatibility here will not affect the validity of the 'impugned' legislation, nor will it be binding on the parties to the proceedings (section 4 HRA). Rather, its effect is to put pressure on the Government and Parliament to remove the offensive provisions of the legislation; and to compensate *ex gratia* the victim(s). A victim who remains unsatisfied can apply to the Strasbourg Court for a remedy. That is why the Government has a stake in this issue.

Given that it is by no means inevitable that the Article 6 claim will succeed, it would be premature to speculate at length on how the Government can sensibly respond to such an eventuality. In the event of a section 4 HRA declaration, one theoretical option would be to statutorily redefine the terms on which section 27 of the 1999 Act was repealed by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The obvious option here is to make the repeal retrospective in effect. The effect of that would be felt in cases still working their way through the system (under arrangements made before April 2013). On that scenario, the court would be required to substitute proportionate for reasonable cost orders, but who will cover the shortfall? Surely that must be the Treasury, insofar as the problem is of the Government's making.

Aarhus, Article 9

The Supreme Court ruled that Aarhus, Article 9, did not apply to a *defendant* in nuisance proceedings, but it could assist a claimant. According to Lord Neuberger, '[Aarhus] may apply to a claimant seeking to prevent a common law nuisance by noise, but I do not see how it can extend to a defendant who is being sued for causing a nuisance by noise'.[88] Lord Carnwath agreed.[89] This appears the first highest judicial recognition that Aarhus applies to private nuisance proceedings.

87 ibid [37].
88 ibid [48].
89 ibid [67].

This content downloaded from
188.241.177.229 on Sat, 03 Jan 2026 01:16:54 UTC
All use subject to https://about.jstor.org/terms

Whilst of no benefit to the respondents, it is of significance that the court was prepared to accept that Aarhus could apply to a claimant in amenity nuisance proceedings in similar circumstances to Mrs Lawrence and Mr Shields. To put this in perspective, the Court of Appeal in *Austin v Miller Argent (South Wales) Ltd*[90]—decided contemporaneously with *Coventry (No 2)* and thus with no cross-referencing—ruled that a private nuisance claim must have a significant benefit for the local community *beyond* the immediate locality inhabited by the claimant for it to engage Aarhus.[91] Brief as their remarks are, it is not clear that Lords Neuberger and Carnwath contemplate quite as restrictive an interpretation in *Coventry*.

Austin is also interesting from the standpoint of *Coventry* because of the sums involved in terms of the defendant's adverse costs. Had Aarhus been considered to apply, the court in *Austin* ruled that the claimants would not be able to cover more than £40,000 in winning costs from the defendant. Perhaps defendants will think again about protective costs orders as a 'complainer's charter', for were they to be unsuccessful in their defence, the reciprocal cap could be a far from negligible silver lining.

CONCLUSIONS

After some notable claimant defeats in the House of Lords in the 1990s, particularly in connection with reasonable foreseeability (*Cambridge Water*)[92] and standing (*Hunter v Canary Wharf*),[93] nuisance law has over the past decade or so helped victims receive remedies in some high profile, and not so high profile, cases. A leading commentator writes of it as undergoing a 'renaissance'.[94] Superficially, the Supreme Court's resolution of *Coventry* fits well within the narrative of a resurgent nuisance law. That is particularly true of the ruling on *Gillingham*, which contains a powerful restatement of nuisance law's autonomy.

On the other hand, the closing of the door on *Gillingham* is compensated for—quite literally—by the opening of another on the availability of damages in lieu of an injunction. In that regard Lord Carnwath's comparison with *Tipping v St Helen's Smelting* is illuminating.[95] *Tipping* made the following three major contributions to the law, all shifting the rules in favour of the claimant:

1. Liability for material or physical injury to property in land is strict bordering on absolute (it does not matter that the defendant carries on a state-of-the-art industrial process in a reasonably chosen locality);
2. Liability can extend beyond physical injury to encompass sensory injury (say displeasing smells as well as physically harmful ones);

90 [2014] EWCA Civ 1012.

91 ibid. At first instance Harman J considered that whilst an injunction, for which there was a reasonable prospect of success, would benefit some homes in the immediate vicinity of the defendant works, 'it is uncertain that it would benefit homes in other vicinities close to the development which covers a large area'. The Court of Appeal upheld that judgment on the basis of 'limited public benefit'.

92 *Cambridge Water Company v Eastern Counties Leather plc* [1994] 2 AC 264.

93 (n 4).

94 S Tromans, 'Environmental and Planning Law – Uneasy Bedfellows' [2012] Proceedings of the Joint Planning Law Conference, Oxford (September 2012).

95 *Coventry (No 1)*(n 2), [175] ('. . .for appellate statements at the highest level in this area of the law one has to go back almost 150 years, to the landmark case of St Helen's Smelting v Tipping').

This content downloaded from
188.241.177.229 on Sat, 03 Jan 2026 01:16:54 UTC
All use subject to https://about.jstor.org/terms

3. Injunctions are to be awarded in cases of persistent pollution virtually as of right (the public interest in the defendant works keeping in business is no argument against awarding an injunction, but it is an argument in favour of an injunction's suspension).[96]

The uncertainty regarding the third of these in *Coventry* raises the prospect of a step back from the advances of the 19th century. Until it is resolved, the future of the law is in the balance.

96 (1865–66) LR 1 Ch App 66.

This content downloaded from
188.241.177.229 on Sat, 03 Jan 2026 01:16:54 UTC
All use subject to https://about.jstor.org/terms